IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1975

No. 75-817

NEBRASKA PRESS ASSOCIATION, OMAHA WORLD-HERALD CO., THE JOURNAL-STAR PRINTING CO., WESTERN PUBLISHING CO., NORTH PLATTE BROADCASTING CO., NEBRASKA BROADCASTING ASSOCIATION, ASSOCIATED PRESS, UNITED PRESS INTERNATIONAL, NEBRASKA PROFESSIONAL CHAPTER OF THE SOCIETY OF PROFESSIONAL JOURNALISTS/SIGMA DELTA CHI, KILEY ARMSTRONG, JAMES HUTTENMAIER, AND WILLIAM EDDY,

Petitioners,

v.

THE HONORABLE HUGH STUART, Judge, District Court of Lincoln County, Nebraska,

Respondent.

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RESPONSE OF STATE OF NEBRASKA TO APPLICATION FOR STAY OF JUDGMENT OF NEBRASKA SUPREME COURT IN STATE V. SIMANTS, NO. 40471

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RESPONSE OF STATE OF NEBRASKA TO MOTION TO TREAT PREVIOUSLY FILED PAPERS AS A PETITION FOR WRIT OF CERTIORARI, AND FOR AN EXPEDITED HEARING

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TO THE HONORABLE CHIEF JUSTICE AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

RESPONSE TO APPLICATION FOR STAY OF JUDGMENT OF NEBRASKA SUPREME COURT

While the Application for Stays herein applied for by the petitioners encompass the Orders of both the District Court and Supreme Court of Nebraska and, in addition, requests vacation by the Court of that part of Mr. Justice Blackmun's Order entered under date of November 20, 1975 which leaves in effect any aspect of the District Court's Order prohibiting publication of information in State of Nebraska vs. Erwin Charles Simants, No. B-2904, entered October 27, 1975, your respondent has been directed by the Deputy Clerk of this Court to respond only to the Application for Stay of the Nebraska Supreme Court Judgment.

In conjunction therewith, petitioners invoke the jurisdiction of this Court pursuant to Section 28 U.S.C. Section 2101 (f). It is respectfully submitted that said statutory authority may not be relied upon to invoke the jurisdiction of the entire Court. Said Statute provides for the stay of a final judgment of any Court subject to review by the Supreme Court on Writ of Certiorari, for a reasonable time, to enable the party aggrieved to obtain a Writ of Certiorari from the Supreme Court. By its precise terms, the Statute provides that the Stay may be granted by a Judge of the Court rendering the Judgment or Decree or by a Justice of the Supreme Court. In addition, the Statute contemplates a supersedeas bond in an amount sufficient to answer for all damages and costs which the other party may sustain by reason of the Stay.

Obviously, the Statute relied upon contemplates action by a Judge of the Court rendering the Judgment or

Decree or by a single Justice of this Court. It is therefore submitted that the purpose of this procedure is to provide a summary procedure to enable an aggrieved party to take proper and necessary steps in making Application for a Writ of Certiorari for consideration by this Court. It is respectfully submitted that petitioners' Application for Stay of the Judgment of the Nebraska Supreme Court entered herein pending final disposition by this Court of the Petition for Writ of Certiorari filed by petitioners should not be entertained for lack of jurisdiction and for the further reason that the expeditious handling of this matter, now before the Court, precludes the practical necessity for such a Stay.

In the event that this Court is not in agreement with your respondent and determines that it does in fact have jurisdiction to enter a Stay of the Order of the Nebraska Supreme Court in Case No. 40471, it is respectfully submitted that a Stay should not be entered on the merits. This is so because of the importance of the issue before the Court. At issue is the resolution of an apparent conflict between the guarantees of the First and Sixth Amendments to the Constitution. The Court is called upon to draw an accommodation between these two preferred Amendments which will preserve the right to a fair trial without abridging freedom of speech and freedom of the press. The Supreme Court of the United States has not yet had occasion to speak definitively where the clash between these two preferred rights was sought to be accommodated by a prior restraint on freedom of the press. However, this Court has indicated that under some circumstances prior restraint may be appropriate. The case of Branzburg v. Hayes, 408 U.S. 665 (1972), involved the claimed right of a newsman not to be compelled to testify before a Grand



Jury. This right was denied and Mr. Justice White in the majority opinion stated as follows:

> "The prevailing view is that the press is not free with impunity to publish everything and anything it desires to publish . . . Despite the fact that news gathering may be hampered, the press is regularly excluded from Grand Jury proceedings, our own conferences, the meetings of other official bodies gathered in executive session, and meetings of private organizations. Newsmen have no constitutional right of access to scenes of crime or disaster when the general public is excluded, and they may be prohibited from attending or publishing information about trials if such restrictions are necessary to insure the defendant a fair trial before an impartial tribunal." P. 361.

In Shepherd v. Maxwell, 384 U.S. 333 (1966), this Court stated in part as follows:

> "From the cases coming here we note that unfair prejudicial news comment on pending trials has become increasingly prevalent. Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to insure that the balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances. Of course, there is nothing that prescribes the press from reporting events that transpire in the courtroom. But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the Judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity. In addition, sequestration of the jury was something the Judge should have raised sua sponte with counsel. If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered but we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the Court should

be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censorable and worthy of diciplinary measures. . . . Since the State Trial Judge did not fulfill his duty to protect Shepherd from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom, we must reverse the denial of the Habeas Petition."

Shepherd v. Maxwell clearly imposes a duty upon the trial Judge, prosecutors, counsel for the defense, the accused, witnesses, court staff and enforcement officers to preclude frustration of the judicial process. The implication in Shepherd v. Maxwell that prior restraints may, under some conditions, be imposed, is given additional credence when read in conjunction with Pennecamp v. United States, 328 U.S. 331, wherein Mr. Justice Reed stated:

"Free discussion of the problems of society is a cardinal principle of Americanism, a principle which all are zealous to preserve. Discussion that follows the termination of a case may be inadequate to emphasize the danger to public welfare of supposedly wrongful judicial conduct. It does not follow that public comment of every character upon pending trials or legal proceedings may be as free as a similar comment after complete disposal of the litigation. Between the extremes there are areas of discussion which an understanding writer will appraise in light of the affect on himself and on the public of creating a clear and present danger to the fair and orderly judicial administration. Courts must have the power to protect the interests of prisoners and litigants before them from unseemly efforts to prevert judicial action. In the borderline instances where it is difficult to say upon which side the alleged offense falls, we think the specific freedom of public comment should weigh heavily against the possible tendency to influence pending cases. Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice."

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In New York Times v. United States, 403 U.S. 713, this Court held that a prior restraint on the media bears a heavy presumption against its constitutional validity. The clear implication of such statement is that if there is only a presumption of unconstitutionality, then there must be some circumstances under which prior restraints may be constitutional.

The Nebraska Supreme Court at Page 9 of its Per Curiam opinion, the substance of which is the subject of this Application for Stay makes the following statement:

"It is of course, absolutely clear that the purpose of freedom of the press is not to determine the outcome of litigation by newspaper publicity, although unfortunately on some occasions it has been so used. Shephard v. Maxwell, supra.); State v. Lovell, 117 Neb. 710; Irvin v. Dowd, 366 U.S. 717; Rideau v. Louisiana, 373 U.S. 723."

The position of the petitioners herein is that the First Amendment rights of freedom of speech and freedom of press are inviolate; that under no circumstances may there be any valid prior restraint upon these admittedly vitally important freedoms. It is respectfully submitted that this position is untenable. No single right or freedom protected by the Constitution of the United States can be read to the exclusion of all other rights and freedoms. The Constitution is a living document. Its parts are not completely autonomus The protected rights of freedom of the press and freedom of speech must necessarily be read in conjunction with the Sixth Amendment right to a fair trial. Mr. Justice Blackmun in his opinion under date of November 20, 1975 recognized this basic fact and upheld the order of the District Court of Nebraska restricting coverage of: (1.) Confessions or admissions against interests made by the accused to law enforcement officials. (2.) Confessions or admissions against interest, oral or written, if any, made by the accused to third parties, excepting any

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statements, if any, made by the accused to representatives of the news media; (3.) Other information strongly implicative of the accused as perpetrator of the slayings. The judgment of the Nebraska Supreme Court conforms with Mr. Justice Blackmun's opinion.

It is respectfully submitted that the basis for entering a Stay of the Judgment of the Nebraska Supreme Court pending final disposition by this Court of the Petition for a Writ of Certiorari filed by petitioners may properly be entered only in a circumstance where the judgment is clearly void. On the basis of the authorities cited above, it is respectfully submitted that the Order of the Nebraska Supreme Court imposing limited restrictions on news coverage of the case here involved, the facts of which as presented to the Court by petitioners is accepted by your respondent, is not clearly void, and in fact is clearly within the guidelines established hereinabove.

Presuming that the Judgment of the Supreme Court of Nebraska here in question is not void as a matter of law, we move now to the merits of the Stay as applicable to the proceedings to which it applies. In this conjunction, it is respectfully submitted that petitioners herein are not entitled to a Stay of the Judgment of the Nebraska Supreme Court in Case No. 40471 for the reason that they have not met their burden in establishing the existance of the required standards enunciated in Graves v. Barnes, 405 U.S. 1201 (1972), and reiterated by Mr. Justice Powell in Times-Picayune Publishing Corporation v. Schulingcamp, 419 U.S. 1301 1974, relative to the issuance of such a Stay.

1. Likelihood of Irreparable Harm:

Petitioners contend that they will suffer irreparable harm if the Order of the District Court of Lincoln County is not immediately stayed. Your respondent submits that the effect of such stay would be to destroy any restrictions on pre-trial



coverage of evidentiary matters, including the existance and contents of certain alleged statements, confessions, and statements against interest reported in the Preliminary Hearing held before the County Court of Lincoln County, Nebraska, on October 22, 1975. It should be pointed out that the Motion for Restrictive Order filed by the State of Nebraska on October 21, 1975, sets forth, that by virtue of the extensive coverage of this action, by both national and local news media, there is a reasonable likelihood of prejudicial news, which would make difficult, if not impossible, the empaneling of an impartial jury and tend to prevent a fair trial should the defendant be bound over to trial. The rationale behind the Prosecution's request is very accurately set forth by petitioners in the first paragraph of Page 12 of their Application, filed with the United States Supreme Court on or about November 4, 1975, which reads as follows:

> "Petitioners recognize that, in some cases, it is arguable that irreparable damage might occur should the defendant's conceded right to a fair trial, for these purposes grounded in his indisputable right to a trial by an impartial jury of his peers selected from a fair cross-section of the community in which the publicity, pretrial or contemporaneous to trial, that would prevent the empaneling of a constitutionally acceptable jury. Petitioners would initially point out that the irreparable injury in such a situation is not that defendant will be incarcerated on the basis of an unfair trial; the injury . . . is to society as a whole, which, due to the impossibility of a defendants obtaining a fair trial, must necessarily forego a conviction of a person who may well have committed the crime for which he is charged." (Emphasis Added)

The paragraph immediately set forth above is an accurate statement of the position of the State of Nebraska. Not only does there arise the question of the defendant's right to a fair trial pursuant to the Sixth Amendment of the United States Constitution, but a corollary of that right is the right of the people to effective prosecution resulting in the conviction of on charged with a crime, provided the State meets its burden of "pr beyond a reasonable doubt". Adverse publicity, which would make

improbable the empaneling of a jury composed of twelve impartial individuals, selected from a cross-section of the community in which the offense occurred, has a severly detrimental effect upon the right of the people of the State of Nebraska to effective and expeditious handling of the matter before the Court. A limited restrictive order designed to preclude this injury is a step which should be taken by a responsible trial judge. Petitioners position is exemplified by a comment made by one of their attorneys on their Application for removal of the restrictive order, held before the District Court of Lincoln County, Nebraska, at about 8:00 p.m. on October 31, 1975, wherein it was stated in substance that it is better that a guilty man should go free than that freedom of the press should be restricted. Your respondent disagrees with that philosophical statement and would respectfully submit that when the effective prosecution of individuals charged with crimes is likely to be impeded by unrestricted publicity, a limited restrictive order is proper.

Relative to the "clear and present danger" standard which petitioners admit to be applicable to the issuance of a restrictive order, Petitioners allege in the action before this Court that the probability of irreparable injury resulting from any pretrial publicity is both remote and speculative. Respondent would respectfully submit that the District Court of Lincoln County. found otherwise. A comment by another of petitioners' attorneys at the hearing before the District Court on October 31, 1975, relative to Petitioners Application for removal of the restrictive order, was to the effect that. in his opinion, by virtue of the publicity that had already been printed, it would be impossible for a trial to be had in Lincoln County in any event. Therefore, by petitioners' own admission, a "clear and present danger" exists threatening the Court's ability to secure a panel of twelve impartial jurors in Lincoln County. This certainly adds force to the Court's decision.



Petitioners further suggest that the threat of injury is remote by virtue of the trial being months away. This is a conclusion of petitioners not substantiated by any Court proceedings and, it does not acknowledge the prosecution's statutory obligation to bring the matter to trial within six months, 29-1207 R.R.S. Supp. 1974. Further, Nebraska law requires that the trial of a criminal case shall be given preference over civil cases, and that the trial of a defendant who is in custody and whose pretrial liberty is reasonably believed to present unusual risk must be given preference over other criminal cases. 29-1205 R.S. Supp. 1974. Defendant here involved is being held without bail and the trial must, therefore, be held at the earliest possible date. In compliance with these statutory obligations, the trial judge has set a January 5, 1976 trial date. Because of the early trial date, and in view of the great interest expressed in this case both regionally and nationally, petitioners' position that adverse effects of pretrial publicity would be substantially reduced by virtue of a cooling off period between arrest and trial is untenable.

Petitioners suggest that a motion for change of venue could be made and sustained as a tool to be used by the Court minimizing the effects of adverse pretrial publicity. Your respondent submits that the granting of a motion for change of venue would not be effective. Petitioners herein include the Omaha World-Herald Co. which publishes a newspaper of general circulation for the entire State of Nebraska; United Press International, and Associated Press, both national organizations for the dissemination of news, not only through Nebraska but throughout the entire country; and the Nebraska Broadcasters Association, the State organization of broadcasters.

Thus, it can be seen that the publicity that this case has received, and is likely to receive in the future, is not localized in Lincoln County, but pervades the entire State of Nebraska and the nation itself.

Given the desire of these powerful organizations to report the tragic event which took place in Lincoln County and is the subject of this action, and given the public exposure inherently possessed by these instrumentalities of dissemination, it would appear that the limited restrictive order entered by the District Court of Lincoln County to preclude wide-spread pretrial publicity of an inflamatory and prejudicial nature is necessary.

It is submitted that a change of venue to surrounding counties may also be precluded in terms of obtaining a fair and impartial jury in the absence of such restrictive order. It should be pointed out that this case involves the mass murder of six people in a small Nebraska community and that the entire population of Nebraska is approximately one and one half million. There have been only a handful of cases involving the murder of six or more people in recent United States history. Given the magnitude of the crime and the inflamatory nature of certain portions of the testimony adduced at the Preliminary Hearing, it would appear that a limited restriction of coverage is certainly warranted.

Relative to petitioners' allegations that the passage of time before the trial will destroy much of the prejudicial effect of pretrial publicity, it is respectfully submitted that scarcely a single day has gone by since the occurrence wherein there has not been a report of the progress of this action in the North Platte Telegraph. This newspaper is the newspaper of general circulation throughout Lincoln County. The matter, certainly being newsworthy, and being put before the people each day, is not likely to lessen in importance as time goes by, but rather will become of greater importance to the people of this community.

Petitioners also suggest that a continuance of the trial would also be a satisfactory method of minimizing the adverse effects of pretrial publicity. Your respondent submits



that this solution is unworkable. As discussed above, the Statutes of the State of Nebraska require the trial Court to give precedence to a case of this nature over all others. The trial Court, the District Court of Lincoln County, Nebraska, invoked the only remedy available to it to insure the defendant his right to a fair trial, as well as the right of the State of Nebraska to effective prosecution and justice.

The threat to a fair trial in this case is neither speculative nor remote. The trial Court found that there was indeed the possibility that certain publicity, in a limited area, would make it difficult if not impossible to empanel an impartial jury. The petitioners' reliance on Murphy v. Florida, 95 S.Ct. 2031 (1975), amounts to an admission that prospective jurors may be influenced.

It is true that news information and exposure do not presumptively deprive a defendant of due process. However, in certain circumstances, and your respondent submits that this case falls within those circumstances, such a presumption would rise to a much higher status and, in fact, could be the basis of a finding that the defendant did not receive a fair trial, thereby depriving the people of the State of Nebraska their right to effective prosecution of a heinous crime.

The entering of a restrictive order by the Honorable Hugh Stuart, District Judge in and for Lincoln County, Nebraska, was predicated on the motion of the prosecution, joined in by defense counsel. The request was made in an effort to protect, not only defendant and his rights but, also, the people of the State of Nebraska and their right to effective prosecution.

Petitioners argue that the Constitution of the State of Nebraska and Section 24-311 R.S. Supp. 1974 require all Court proceedings to be open to the general public. It should be noted that all proceedings in this case have been open to the public, but that dissemination of certain information, hereunder more specifically discussed, has been restricted in

a limited fashion. Such a restrictive order would appear to be both proper and sanctioned in a situation where its absence presents a "clear and present danger" of an inability to empanel a fair and impartial jury. Shepherd v. Maxwell.

Your respondent fully agrees with petitioners that a prior restraint upon the press, to any degree, should only be imposed in the most limited circumstances. However, it is submitted that those circumstances clearly exist in the case of State of Nebraska v. Erwin Charles Simants.

It must be remembered that at the time the trial judge acted, a restrictive order entered by the County Court of Lincoln County was already in existance. It could be anticipated that should the trial judge have refused to enter a restrictive order, this refusal may have been interpreted by the news media as a Court determination that anything relative to facts within their knowledge concerning the case would be proper for dissemination. The reality of this danger is substantiated by a front page article written by William Eddy, one of the petitioners herein, appearing in the North Platte Telegraph on Ocotber 24, 1975, wherein Mr. Eddy, in discussing the bar-press guidelines here involved states as follows:

> "There is some question among newsmen as to whether the guidelines cover testimony at a Preliminary Hearing. If they do, newsmen who attended Wednesday's Preliminary Hearing generally agree that parts of the testimony by at least three witnesses should not be reported."

Therefore, it would appear, that should the newsmen have decided that the guidelines do not cover testimony at a Preliminary Hearing all testimony of the witnesses could have been reported. It is respectfully submitted that petitioners herein are confusing the issue of a public trial and pretrial publicity.

As set forth in the Per Curium opinion of the Nebraska Supreme Court at Page 12:



> "The record demonstrates clearly that even before the defendant was afforded a Preliminary Hearing which the Statutes of this state, namely Section 29-1607 R.S. Supp., (1974), and probably the Constitution of the United States, requires (see Gerstein v. Pugh, 420 U.S. 103), certain of the newspapers had printed articles which contained hearing information, of purported statements of counsel, which, if true, tended clearly to connect the accused with the slayings and which information, if true, was likely to be, or at least some of it, presented at the Preliminary Hearing. The items to which we refer were printed in the articles of the October 20, 1975, issue of the North Platte Telegraph; the October 20, 1975, issue of the Lincoln Star; the October 20, 1975, issue of the Denver Post. This information, if obtained from official sources, would not under the provisions of Item 1 of the Guidelines under the heading "Information Generally not Appropriate for Disclosure and Reporting" be appropriate for reporting. The record shows that this was recognized by some of the media, but doubt was expressed that the voluntary guidelines would apply at a preliminary hearing. The District Court, therefore, could quite properly conclude that their evidence from the Preliminary Hearing, if it was in fact presented, would have again been repeated by at least some of the relators."

2. Possibility of Reversal of Lower Court's Decision:

Your respondent does not accept petitioners' avowal that an analysis of case law leads to the conclusion that petitioners would prevail on the merits before this Court. Under the standard of "clear and present danger" the Nebraska Supreme Court took such steps as it deemed necessary to insure an orderly disposition of this case. The nature of the crime charged and the underlying circumstances of the crime made it imperative that the trial court take necessary steps to eliminate the "clear and present danger" by the issuance of a restrictive order which, in light of the circumstances, is narrow in scope. Not only is the action of the trial Court constitutionally permissible but is demanded in order to insure the protection of the fundamental rights presented to this Court. It remains within the province of the trial Court to determine reasonably what steps must be taken in order to insure the

orderly disposition of cases before it. The trial Court alone had access to the information and evidence needed to make this decision. Indeed, it was the failure of the trial Court to act responsibly in this regard which caused it to commit prejudicial error in the case of Shepherd v. Maxwell.

Petitioners complain that the order in question restricts only members of the news media and not other officers of the Court or members of the general public. The Nebraska Bar-Press Guidelines for Disclosure and Reporting on Information Relating to Imminent or Pending Criminal Litigation in its opening statement reads: "Generally, it is not appropriate to disclose or report the following information." Therefore, it is obvious that certainly officers of the Court and Court personnel are precluded from disclosing information pursuant to the order as surely as the news media is precluded from reporting such limited information. It would be ludicrous for the Court to impose an order on members of the general public who were present in Court for the Preliminary Hearing to the effect that they could not discuss the matter with their friends and relatives in that such an order obviously would be impossible to enforce. The purpose of the restrictive order is to preclude such a saturation of the community with prejudicial pretrial publicity as to render it improbable that a fair and impartial jury may be obtained.

Petitioners rely heavily on Times-Picayune and Cox Broadcasting.[1] Your respondent submits that these cases are clearly distinguishable from the instant case and are not dispositive of the questions here presented. In Times-Picayune, the defendant was arrested some days after the commission of the crime, but the restrictive order was not entered until eleven months later. That fact alone distinguishes the cases. Your respondent does not argue that the concept of

[1] Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)



a "cooling off period" was not applicable to that case involving a crime which was committed in New Orleans which city has a population of several million persons. Obviously, there is a vast difference in the number of potential jurors available and their exposure to violent crimes between New Orleans and the State of Nebraska. The entire State of Nebraska only has a population of approximately one and one-half million persons. The conclusion to be drawn therefrom is inescapable. Further, the order of the trial Court in Times-Picayune was more pervasive than that of the trial Court in the instant case.

Cox Broadcasting is distinguishable by the fact that the matters published had been adduced at a trial. In the instant case we are dealing with matters that were adduced at a Preliminary Hearing. It is submitted that the very nature of a Preliminary Hearing is to establish probable cause for the arrest of the defendant. Hearsay testimony may be admissable and the fact that certain evidence is adduced at a Preliminary Hearing does not in any sense insure that such information will be received into evidence at the time of trial. Absent an order restricting pretrial publicity of matters which may be prejudicial to the right of the State of Nebraska to effective enforcement of its laws and the right of a criminal defendant to a fair trial, both the prosecution and defense, in a situation such as is now before the Court, are faced with a serious dilemma.

The right to a Preliminary Hearing is a right belonging to the accused. He may waive the Preliminary Hearing should he desire. However, if it is impossible to restrict prejudicial coverage, a criminal defendant, if he chooses to exercise his right to a Preliminary Hearing, may prejudice his right to a fair trial. In addition, by virtue of the evidence which the State may be required to submit at the Preliminary Hearing in order to obtain a bind over to the District Court, the right of the citizens of the State of Nebraska to effective prosecution

as a result of prejudical publicity emanating from testimony adduced at the Preliminary Hearing may also be frustrated. If the defendant, on the other hand, chooses to waive a Preliminary Hearing he may be precluded from raising the legal question of "probable cause" for his arrest. In the instant case, the exercise of defendant's right to a Preliminary Hearing, in the absence of a restrictive order, is detrimental to the case of the State of Nebraska. In the absence of a restrictive order, the prosecution would have been required to choose between the possibility of not adducing enough evidence to secure a bind over of the defendant to the District Court for trial or of submitting enough evidence to insure the bind over but possibly pave the way for a mistrial due to prejudicial pretrial publicity. It is respectfully submitted that neither the right of the defendant to a Preliminary Hearing nor the right of the State of Nebraska to effective enforcement of its laws should be impaired by prejudicial coverage by the media.

The fact that the restrictive order restrained the press from publishing the entire proceedings of the Preliminary Hearing while the general public was not so restricted only recognized a practical consideration. The Court cannot hope to enforce an order requiring individual citizens to refrain from discussing what they saw and heard at the Preliminary Hearing. However, because of the potential damage from, and wide-spread pervasive dissemination by the press, a practical approach was followed by the District Court of Lincoln County and upheld by the Nebraska Supreme Court, entering a restrictive order on pretrial publicity, limited in scope.

Your respondent recognizes the important responsibility and right of the news media to publish public information. It is not submitted that the First Amendment right is subservient to that of the Sixth Amendment. Rather, the question here involved is a matter of timing. The facts and circumstances surrounding this case demanded immediate and responsible action by the trial Court.



Petitioners admit that the Courts recognize the validity of narrow restrictive orders upon pretrial publicity. Newspapers Inc. v. Black, No. A-985, Cert. Denied, June 2, 1975. The order here involved is a narrow protective order designed to ensure both the defendant his right to a fair trial by an impartial jury and the State's right to prosecute an individual for a crime without the possibility of a mistrial being declared due to prejudicial pretrial publicity.

3. The Probability That Four Members of the Court Would Grant Certiorari:

Relative to this standard, your respondent respectfully defers to the judgment of the Court. However, it is submitted that the narrow limitations imposed by the restrictive order presented to the Court do not provide a vehicle which can properly provide effective guidelines to the questions here involved. The factual circumstances before the Court on the Application of petitioners do not present an issue sufficiently meritorious to warrant a Writ of Certiorari. While there is no question that there is need for guidance in the area of potential conflict between the First Amendment right of freedom of the press and freedom of speech and the Sixth Amendment right to a fair trial, it would appear that this is not an appropriate case to provide such guidance.

The administration of criminal justice in the United States demands that the press generally be allowed to publish freely all matters transpiring in open Court. The news media is an important watchdog for the people to ensure the proper functioning of the judicial system. However, the administration of criminal justice also demands, that in certain circumstances, pretrial publicity must be limited in order to ensure the rights established under the Constitution of the United States.

There will be no objection to the publishing of trial testimony as it is received into evidence at the time of

trial for the reason that a jury will have been empaneled and, in all likelihood, sequestered at that time. Therefore, the publicity reported at the time of trial will in no way prejudice the proper functioning of the judicial system.

It is submitted that the limited restrictions imposed upon the press, relative to pretrial publicity, in a case of this magnitude, are totally justifiable within the concept of "clear and present danger".

For the above reasons your respondent prays that the Application herein for an immediate Stay by this Court of the Judgement of the Nebraska Supreme Court in Case No. 40471 pending final disposition by this Court of the Petition for a Writ of Certiorari by petitioners be dismissed.

RESPONSE TO MOTION OF PETITIONERS TO TREAT PREVIOUSLY FILED PAPERS AS A PETITION FOR A WRIT OF CERTIORARI, AND FOR EXPEDITED HEARING.

The petitioners have asked this Court to treat previously filed papers as a Writ of Certiorari, or, in the alternative, treat the Motion itself as a Petition for the Writ of Certiorari. The petitioners cite New York Times Co. as precedent for such procedure. However, the Times case involved appeals from the Federal District Court and Circuit Court of Appeals and, therefore, bears no similarity to the instant case.

The Rules of the United States Supreme Court provide procedures to follow in petitioning the Court for a Writ of Certiorari. The rules are not merely procedural nicities but provide an organized guide to insure the proper administration of justice.

The Rules also provide a safeguard for procedural due process. Due process cannot be guaranteed through summary procedures whereby petitioners file a Motion in which they admit they do not know the basis on which they rely for the granting of a Writ of Certiorari. Further, the Rules provide a basis upon which respondent may properly reply to the



rationale propounded by petitioners argument that a Writ of Certiorari should be granted. Petitioners failed to accomplish this end in their Motion to treat previously filed papers as a Petition for a Writ of Certiorari.

As to its argument for treating the previously filed papers as a Petition for Writ of Certiorari or the Motion itself, petitioners point to alleged anomalies in these proceedings:

1. Petitioners complain that they may print the entire opinion of the Nebraska Supreme Court, but that only portions of the opinion of Mr. Justice Blackmun may be printed. Respondent submits that this observation cannot be a basis for a Writ of Certiorari.

2. Petitioners point out that they alone are subjected to the prior restraints under the Nebraska Supreme Court opinion. Petitioners voluntarily subjected themselves to the jurisdiction of the District Court of Lincoln County, Nebraska. There was no penalty imposed soley because of their voluntary submission to the jurisdiction of the Court. Rather, the action of the Nebraska Courts resulted in a natural judicial determination, based on their interpretation of the law, and was binding on all parties over which it had jurisdiction, including Petitioners who had voluntarily submitted to such jurisdiction.

3. Petitioners state that a portion of the Order of the Nebraska Supreme Court is "totally incapable of logical interpretation and application". Interpretation and application do not go to the merits of the issue before this Court and are merely a conclusion of the Petitioners, unsupported by argument.

4. Petitioners state that the proof of injury relied upon by the Nebraska Supreme Court consisted of articles in three newspapers, two of which were located some

distance from the probable site of trial. This argument is unfounded. There were indeed other circumstances considered by the trial Court which were taken into account by the Nebraska Supreme Court. (Pages 12 and 13.)

5. Petitioners argue that the order of the Nebraska Supreme Court is a minority view of that Court. Respondent would point out that the opinion was a Per Curiam opinion, in which five members of the Court joined. Petitioners further states that "Justice Spencer and Newton joined the majority solely to resolve the dispute but said they agreed with the dissenters". A reading of the concurring opinion does not lead to that conclusion. While Judges Spencer and Newton agreed with the dissenting opinion, they did, in fact, join in the majority opinion. Therefore, the views which underlie the prior restraints imposed are those of Judges Boslaugh, McCown, Brodkey, Spencer, and Newton.

Respondent respectfully submits that the Motion of the Petitioners and the arguments contained therein are insufficient to constitute a Petition for Writ of Certiorari. Therefore, respondent respectfully requests that the Motion of the Petitioners be denied and that the applicable rules of the United States Supreme Court be followed by the Petitioners.

MOTION FOR EXPEDITED HEARING

If this Court treats the Motion of the Petitioners as a Petition for Writ of Certiorari, the respondent would not oppose the Motion for Expedited Hearing and would comply with any decision of this Court. However, Respondent respectfully requests this Court to take into consideration the practical limitations of time and manpower in the County Attorney's Office of Lincoln County, Nebraska, and requests that it be allowed a reasonable time to prepare for any further proceedings in this matter.



WHEREFORE, for the above reasons, the respondent prays that the Applications for Stays and the Motion to Treat Previously Filed Papers as a Petition for a Writ of Certiorari be denied, and in the alternative if the Motions are granted, that the Respondent be allowed a reasonable time to prepare for any further proceedings.

RESPECTFULLY SUBMITTED

RESPONDENT, THE STATE OF NEBRASKA

By Milton R. Larson
MILTON R. LARSON
Lincoln County Attorney

By
JOHN P. MURPHY
Deputy Lincoln County Attorney

For: Office of Lincoln County Attorney
Lincoln County Courthouse
North Platte, Nebraska 69101
308-534-4350, exts. 270, 271, 272

STATE OF NEBRASKA )
) SS
COUNTY OF LINCOLN )

MILTON R. LARSON, being first duly sworn, on oath, deposes and says that he is the duly elected, qualified and acting County Attorney in and for Lincoln County, Nebraska and that he is one of the respondents herein; that he has read the foregoing, knows the contents thereof, and that the statements therein contained are true as he verily believes.

Milton R. Larson
MILTON R. LARSON

SUBSCRIBED and sworn to before me this 8th dav of December, 1975.

YVONNE KEPPLINGER
GENERAL
NOTARY
COMMISSION
EXPIRES
MAY 12, 1979
STATE OF NEBRASKA

Yvonne Keppinger
Notary Public